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GENERAL COUNSEL
OF COPYRIGHT

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

Distribution of 1999, 2000 and 2001
Digital Audio Recording Royalty Funds

Docket No. 2002-6 CARP DD 99-01

**MOTION TO DECIDE THE CONTROVERSY ON
THE BASIS OF WRITTEN PLEADINGS**

Broadcast Music, Inc. ("BMI"), the American Society of Composers, Authors and Publishers ("ASCAP"), SESAC, Inc. ("SESAC"), The Harry Fox Agency, Inc. ("HFA") and The Songwriters Guild of America ("SGA") (collectively, the "Settling Parties") hereby move the Librarian of Congress (the "Librarian") to dispense with formal hearings in the above-captioned proceeding pursuant to 37 C.F.R. § 251.41(b) and to have the CARP decide the controversy based on the written pleadings submitted by the parties or to designate the issue of whether to decide the controversy based on the written pleadings to the Copyright Arbitration Royalty Panel ("CARP") for its consideration pursuant to 37 C.F.R. § 251.42. The Settling Parties note that the Librarian has designated the issue of whether to suspend formal hearings to the CARP and the CARP has decided to proceed on written cases in the two previous DART distribution proceedings involving the parties to the instant proceeding and similar amounts in controversy.

I. Background

The Settling Parties represent all claimants but one to Musical Works Fund royalties in this distribution proceeding, and virtually all claimants to copyrighted musical works distributed

or disseminated to the public in transmissions in the United States during the relevant period. As is stated in the Settling Parties' Report on the Status of Settlement Negotiations filed on December 2, 2002, the Settling Parties have diligently pursued and negotiated settlements among themselves.

With the settlements among the Settling Parties in place, the only remaining controversy was between the Settling Parties and one individual claimant: Alicia Carolyn Evelyn. Although the Settling Parties have actively pursued settlement with Ms. Evelyn, a settlement has not been reached and, accordingly, the Settling Parties are filing simultaneously in the Copyright Office this motion with their Direct Case in accordance with the Office's order dated October 21, 2002. Ms. Evelyn filed claims in only the Writers Subfunds of the 1999, 2000 and 2001 Musical Works Funds, and, accordingly, these are the only funds with respect to which controversy exists.

II. Motion to Decide the Controversy on the Basis of the Written Pleadings

The rules and precedents that govern CARP proceedings clearly allow for the dispensing with formal hearings and having the controversy resolved based on the written record.¹ Rule 251.41(b) provides that the Librarian may grant a motion to dispense with formal hearings to have the CARP decide the controversy based on written pleadings if (1) the controversy does not involve any genuine issue of material fact; or (2) all of the parties to the proceeding consent. 37 C.F.R. § 251.41(b) (2002). In addition, Rule 251.42 authorizes a CARP panel to dispense with formal hearings and to decide the controversy based on written pleadings upon a showing of "good cause." 37 C.F.R. § 251.42 (2002).

¹ If the Motion to Decide the Controversy on the Basis of the Written Pleadings is granted, the Settling Parties hereby reserve the right to file replies to all written documents submitted by Ms. Evelyn.

The Librarian has in previous CARP proceedings designated to a CARP for its consideration whether "good cause" exists to suspend formal hearings and to decide the controversy as to the distribution of royalty funds on the written pleadings. See, e.g., Order in Docket No. 94-3 CARP CD 90-92 (August 19, 1997); Order in Docket No. 95-1 CARP DD 92-94 (July 25, 1996). A CARP has determined that "good cause" exists "where the public interest will be served in that a proceeding based on the written pleadings will minimize the costs to all claimants while still allowing complete consideration of all of the evidence . . . submitted by the parties in their direct cases." See CARP Order in Docket No. 99-3 CARP DD 95-98 (June 19, 2000); CARP Order in Docket No. 95-1 CARP DD 92-94 (suspending formal hearings and deciding to proceed on written cases in DART distribution proceedings involving Ms. Evelyn and similar amounts in controversy).

Because DART royalties otherwise due songwriters and music publishers will be used to pay for the arbitration process, it is in the interest of all parties to keep costs to a minimum. Given the already relatively small amount of royalties being distributed pursuant to this proceeding and the even smaller amount of royalties in controversy, the Settling Parties believe that good cause exists to proceed based on the written pleadings in this instance.

In short, the background and circumstances of this proceeding, together with considerations of public policy and fundamental fairness, strongly suggest that "good cause" exists and, accordingly, that the Librarian should certify to the Panel this Motion to Decide the Controversy on the Basis of Written Pleadings. In the alternative, the Librarian should exercise his authority and grant this Motion so that the copyright royalty funds are not further depleted by the cost of an unnecessary trial.

III. Conclusion

For the reasons set forth above, the Settling Parties respectfully request that the Librarian certify the Motion to Decide the Controversy on the Basis of Written Pleadings to the CARP or, alternatively, grant the motion.

Respectfully submitted,

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January 15, 2003

CERTIFICATE OF SERVICE

I, Cynthia Queen, hereby certify that on this 15th day of January, 2003, a copy of the foregoing Motion to Decide the Controversy on the Basis of Written Pleadings of Broadcast Music, Inc., the American Society of Composers, Authors and Publishers, SESAC, Inc., The Harry Fox Agency, Inc. and The Songwriters Guild of America was served by overnight express courier to the following:

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Cynthia Queen